Supreme Court, U.S.
FILED
NOV 19 2004
OFFICE OF THE CLERK

(14)

No. 03-287

In The Supreme Court Of The United States

REGINALD WILKINSON, Director, et al.,
Petitioners,

v.

WILLIAM DWIGHT DOTSON, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE*
State Solicitor
**Counsel of Record*
STEPHEN P. CARNEY
Senior Deputy Solicitor
TODD R. MARTI
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. *Heck* prevents collateral attack on state decisions, and thus it bars Respondents' claims as they seek to attack such decisions 2

B. Parole decisions are "sentencing decisions" for purposes of *Heck* 6

C. The intervening parole decisions further demonstrate why the Respondents' claims here are *Heck*-barred 9

D. Respondents' claims are cognizable in habeas and are therefore *Heck*-barred 11

E. Respondents' arguments notwithstanding, comity and federalism concerns do support routing the claims here through habeas 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Allen v. McCurry,
449 U.S. 90 (1980) 14

Ankrom v. Hageman,
Case No. 01CVH02-1563
(Franklin Co. C. P., Aug. 31, 2004) 16

Bellotti v. Baird,
428 U.S. 132 (1976) 16

In re Bonner,
151 U.S. 242 (1894) 14

Braden v. 30th Dist. Cir. Ct.,
410 U.S. 484 (1973) 13

Edwards v. Balisok,
520 U.S. 641 (1997) ..... *passim*

Fair Assessment in Real Estate Ass'n v. McNary,
454 U.S. 100 (1981) 15

Fay v. Noia,
372 U.S. 391 (1963) 14

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 7, 8

Garlotte v. Fordice,
515 U.S. 39 (1995) 13, 14

Page

Greenholtz v. Inmates of the Neb. Penal and Corr. Complex,
442 U.S. 1 (1979) 8

Heck v. Humphrey,
512 U.S. 477 (1994) ..... *passim*

Huffman v. Pursue, Ltd.,
420 U.S. 592 (1975) 15

INS v. St. Cyr,
533 U.S. 289 (2001) 14

Iron Arrow Honor Soc'y v. Heckler,
464 U.S. 67 (1983) 11

Johnson v. Avery,
393 U.S. 483 (1969) 14

Juidice v. Vail,
430 U.S. 327 (1977) 15

Layne v. Ohio Adult Parole Auth.,
97 Ohio St. 3d 456 (2002) 16

Maleng v. Cook,
490 U.S. 488 (1989) 13

Muhammad v. Close,
124 S. Ct. 1303 (2004) 4

In re Medley, 134 U.S. 160 (1889) 14

Ohio Adult Parole Auth. v. Woodard,
523 U.S. 272 (1998) 7

Page

Pa. Bd. of Prob. & Parole v. Scott,
524 U.S. 357 (1998) 7

Pennzoil Co. v. Texaco,
481 U.S. 1 (1987) 16

Peyton v. Rowe,
391 U.S. 54 (1965) 14

Preiser v. Rodriquez,
411 U.S. 475 (1973) ..... *passim*

Ross v. Moffitt,
417 U.S. 600 (1974) 7

Spencer v. Kemna,
523 U.S. 1 (1998) 6

Stefanelli v. Minard,
342 U.S. 117 (1951) 15

Townsend v. Swain,
372 U.S. 293 (1963) 14

Trainor v. Hernandez,
431 U.S. 434 (1977) 15

Wolff v. McDonnell,
418 U.S. 539 (1974) 7, 8

Younger v. Harris,
401 U.S. 37 (1971) 15

Page

Statutes

28 U.S.C. § 2241(c)(3) 13

28 U.S.C. § 2254(a) 13

42 U.S.C. § 1983 ..... *passim*

ARGUMENT

One key mistake permeates Respondents' briefs. They insist that *Heck v. Humphrey*, 512 U.S. 477 (1994), is designed to prevent collateral attacks on state confinement. It is not. Rather, as we showed in our opening brief, *Heck* is concerned with a claim's impact on state decisions, not on the confinement that results from those decisions. Once that distinction is clear, Respondents' remaining arguments fall away. Parole decisions are sentencing decisions for *Heck* purposes in that they directly impact the duration of incarceration. And the new parole decisions in 2002 do not help Respondents, but rather hurt them. For these are simply two more state decisions for which success on Respondents' claims would "necessarily imply invalidity."

Nor do Respondents fare any better in their opposition to Petitioners' relief-based argument. We showed that the relief Respondents request here—immediate new release hearings, and an increase in the frequency of future release hearings—independently triggers *Heck's* bar. And in making this argument, Petitioners are not, as Respondents assert, improperly raising *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Rather, *Heck* incorporates *Preiser's* command that claims seeking immediate or speedier release, the result Respondents ultimately seek here, must be routed to habeas.

In the end, Respondents attack state sentencing decisions, and they do so not in hopes of improving the conditions of their confinement, but rather in hopes of hastening its end. Under *Heck*, such claims must be brought, if it all, in habeas.

A. *Heck* prevents collateral attack on state decisions, and thus it bars Respondents' claims as they seek to attack such decisions.

Respondents do not meaningfully dispute that their ex post facto claims would remove the legal bases for their parole decisions. Instead they ask the Court to overlook the impact success on those claims would have on the state decision, and instead focus on the impact on the prisoner's confinement. The Court should decline their request for three reasons.

1. Respondents' argument is based on the unsupported premise that the *Heck* bar is concerned with preventing attacks on confinement rather than preventing attacks on decisions. So, for example, Johnson asserts that the applicability of the *Heck* bar turns on whether the claims "will, if successful, have a direct or necessary effect on the lawfulness of the fact or duration of the prisoner's confinement." Johnson Br. at 23. Dotson similarly argues that *Heck* applies only if success would show that a prisoner's "sentence or continuing incarceration was illegal." Dotson Br. at 12. That is, both look to the potential consequences of invalidating the state decision, rather than to the impact of the federal court judgment on the state decision itself, in defining *Heck's* scope. But that understanding of *Heck* is flawed.

First, Respondents' approach is inconsistent with the fundamental principle animating *Heck*—"the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486. The *Heck* Court amplified this principle by citing to the "strong judicial policy against the creation of two conflicting resolutions arising out of the same . . . transaction," by its expressed "concerns for finality and consistency," and by its disinclination "to expand

opportunities for collateral attack." *Id.* at 484-485. These concerns, however, are all directed toward protecting the state *decision* from collateral attack in federal court, not the confinement that results from that conviction. A decision needs "finality"; a confinement does not.

The claims here are a direct attack on a protected decision. As described below, parole decisions count for *Heck's* purposes. And the claims here, if successful, would invalidate those decisions. It is that invalidation itself, not the consequences of the invalidation (i.e., the impact of the invalidation on the prisoner's confinement), that triggers *Heck's* bar. The "concern for finality," *id.* at 484-486, is fully implicated by the initial nullification of the state decision, regardless of what may follow. Yet Respondents' approach looks *only* to what follows, and thus overlooks the core harm *Heck* sought to address.

Second, the snippets Respondents quote from *Heck* and its progeny do not, when read in context, support their premise that *Heck* is limited to claims that will inevitably effect confinement. Although *Heck's* discussion of the general bases for its holding did mention claims that "necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement," *id.* at 486, its specific holding did not make an inevitable effect on confinement a precondition to the applicability of its favorable termination requirement. Indeed, another part of the opinion stated that the requirement applied to claims by released prisoners, claims that could not possibly effect confinement. *Id.* at 490 n.10. And even if *Heck* were so limited, it is of no help to Respondents, as their claims *do* challenge the lawfulness of the definite periods of confinement their parole decisions imposed.

Moreover, while *Edwards v. Balisok* characterized the claim at issue there as one that that implied "the invalidity of

the punishment imposed," 520 U.S. 641, 648 (1997), that statement cannot be read to require a definite impact on confinement. Given *Balisok's* primary emphasis on the decision-making process itself, its express recognition that the same result would likely occur on rehearing, and the absence of any analysis even remotely relating to confinement, the quoted language is better understood as a shorthand reference to the challenged decision than a requirement that the claim inevitably affect confinement. And, as was true of the fragment from *Heck* just discussed, that statement does not help Respondents in any event. They *do* challenge the terms of imprisonment imposed by their parole decisions—"the punishment imposed"—claiming that the challenged regulations unconstitutionally lengthened those terms.

Similarly, Respondents' reliance on *Muhammad v. Close's* statement that *Heck* is irrelevant if the prisoner's claim "threatens no consequence for . . . the duration of his sentence," 124 S. Ct. 1303, 1304 (2004), does not help them. Once again, Respondents' claims do "threaten consequences" for the time they will serve. Their claims, if successful, would limit the quantum of time between release hearings, thus shortening the punishment imposed.

2. Nor is Dotson correct that because a new parole hearing would not necessarily "change the outcome," there is no invalidation. Dotson Br. at 29. That the parole hearing "might have come out the same way even if the [new] guidelines had not been invoked," or that it may come out the same way if the State conducts the hearing again, is simply irrelevant. *Id.* As noted above, it is the initial nullification of the state decision, even if the State may reach the same result again, that offends *Heck*.

And, in any event, Dotson's argument—that a new hearing following success on his claims may lead to the same

outcome—is also wrong on the facts. As noted above, application of the new guidelines would increase the frequency of release hearings, thereby shortening the time for earliest release after denial. Thus, success on his claims would change the outcome of his new hearing.

3. Respondents' argument that they are only seeking relief directed at future hearings, and thus do not trigger *Heck*, is similarly unavailing. Dotson Br. at 31-35; Johnson Br. at 42-45. *Heck* clearly teaches that the specific form of relief a prisoner seeks is irrelevant. The only question is the "necessary implication" of the federal judgment for the validity of a protected state decision. A judgment that the Ex Post Facto Clause prohibits using the guidelines in future hearings may not expressly invalidate the results of Respondents' prior guideline-based hearings, but it would be impossible to avoid the implication that those prior hearings were invalid. That is enough to trigger *Heck*.

To be sure, in *Balisok* the Court did note that declaratory relief directed at future hearings often will not offend *Heck*. But that is true only where the claimed error giving rise to relief—there the failure to time-stamp documents—"would not necessarily imply the invalidity" of earlier decisions. 520 U.S. at 650 (Ginsburg, J., concurring). The declaration Respondents seek here, however, would most certainly have that forbidden effect.

***

In sum, *Heck* and *Balisok* hold that a prisoner cannot "invalidate" a protected decision through a 42 U.S.C. § 1983 claim. Respondents' challenges to their parole decisions will, if successful, take those decisions off the books and prevent them from being reissued on alternate bases. That will "invalidate" those decisions under any understanding of that term.

B. Parole decisions are "sentencing decisions" for purposes of *Heck*.

Petitioners' opening brief explained that the parole decisions challenged here are integral parts of prisoners' sentences. They are formalized state determinations that a given prisoner will remain incarcerated, and will not be again considered for release for some specified period of time. Accordingly, Petitioners urged that those decisions are protected by *Heck's* prohibition against challenging sentences through § 1983. Petitioners' Br. at 20-31.

Respondents do not dispute that parole decisions directly impact the duration of confinement, but they nonetheless argue that such decisions do not count as sentencing decisions for *Heck's* purposes. They are wrong.

1. *Balisok* belies Respondents' suggestion that only judicial decisions count as sentences. See Johnson Br. at 28-34; Dotson Br. at 35-38. According to Johnson, "the actual sentence is for the maximum period imposed by the court." Johnson Br. at 30 (quotation omitted). Parole is not a "sentencing power," he says, but rather the power to commute an existing sentence. *Id.* at 31. In other words, Respondents argue that only the judge imposes the sentence, and that all subsequent decisions regarding how much of the sentence will be served are not "sentencing decisions," and thus do not count for *Heck's* purposes.

That bright-line rule, however, cannot be squared with this Court's decision in *Balisok*. *Balisok* applied *Heck* to bar a claim that, if successful, would undermine an administrative decision, thus making it clear that the doctrine is not limited to claims implicating court orders. *See also Spencer v. Kemna*, 523 U.S. 1, 17-18 (1998) (analyzing *Heck's* scope in a case involving a parole board decision).

2. Nor does it matter, as Respondents suggest, that prisoners do not receive at parole hearings the full panoply of rights afforded in criminal trials. Respondents argue that the lack of such rights means that parole decisions are not "sentencing decisions" (and thus are not protected by *Heck*). See Johnson Br. at 31-34; Dotson Br. at 36. But that argument starts from a faulty premise, and thus arrives at a faulty conclusion.

The argument presumes that full criminal trial rights must be afforded whenever state proceedings implicate a sentence. That is demonstrably untrue, as this Court has repeatedly upheld less demanding procedures in proceedings directly implicating criminal sentences. *Wolff v. McDonnell*, 418 U.S. 539, 567-571 (1974), rejected calls for trial-type rights in proceedings concerning sentence-shortening good-time credits. *Gagnon v. Scarpelli*, 411 U.S. 778, 787-790 (1973), upheld informal procedures in probation revocation proceedings. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), upheld minimal procedures in clemency proceedings. Those proceedings all directly implicated criminal sentences, and they and other precedents establish that a proceeding can do so without triggering full-fledged criminal protections. See also *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 369 (1998) (exclusionary rule inapplicable to parole revocation proceedings).

Those precedents are based on three principles that compel the same result here. The first is that the criminal trial rights Respondents discuss are required only when the State mobilizes its prosecutorial resources to deprive an individual of his liberty, not when proceedings instead seek to relieve the burdens of previously-imposed criminal liability. *Ross v. Moffitt*, 417 U.S. 600, 610-611 (1974). The second is that these protections are not necessary when the individual's liberty has already been constitutionally restricted. *Woodard*, 523 U.S at 280-282 (plurality opinion);

id. at 288-290 (O'Connor, J., concurring). A third is that the protections are not required when they would be incompatible with the nature of the decision to be made. *Gagnon*, 411 U.S. at 787-788; *Wolff*, 418 U.S. at 569-570.

All of those principles apply here. Parole proceedings are not initiated to deprive a prisoner of rights, but instead to consider granting freedom, and there is no prosecutorial effort to counterbalance. Further, parole proceedings occur only after someone has been deprived of liberty in proceedings where he received, or waived, full constitutional protections. Finally, this Court has correctly noted that trial-type procedures would be counterproductive in parole proceedings given the predictive and subjective decisions to be made there. *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 13-14 (1979). Thus, it is irrelevant that parole decisions are not accompanied by full trial rights.

In fact, accepting Respondents' argument that only those sentencing processes where a prisoner receives full trial rights are eligible for *Heck's* protection would be inconsistent with this Court's precedent. *Balisok* applied *Heck* to an administrative decision regarding good time credit, and no one has ever suggested that full trial rights apply at good time hearings.

Furthermore, accepting Respondents' narrow definition of "sentencing decision" would frustrate one of *Heck's* objectives. Barring federal review until state courts have an opportunity to review a prisoner's claim allows the federal courts to take advantage of state court expertise on issues of prison administration, an area "peculiarly within state authority and expertise." *Preiser*, 411 U.S. at 492. But, Respondents' proposed definition of sentence would cause exactly the opposite result, requiring federal courts to tackle the arcana of state parole administration before their state

counterparts, already familiar with that complicated subject, could pass on the propriety of disputed decisions.

In sum, none of Respondents' arguments overcome the simple truth that parole decisions directly impact the duration of confinement, and thus are an inherent and integral part of criminal offenders' sentences.

C. The intervening parole decisions further demonstrate why the Respondents' claims here are *Heck*-barred.

Both Respondents argue that their cases no longer threaten to invalidate decisions protected by *Heck* because their complaints attack parole hearings held in 1999 (Johnson) and 2000 (Dotson) and they have since received new parole hearings in 2002, hearings that were not expressly challenged in their complaints. Dotson Br. at 27-28; Johnson Br. at 24, 42-43. Their arguments fail for at least three reasons.

1. As Respondents concede, prisoners cannot escape *Heck* merely based on "what the prisoner asks for in his complaint." Dotson Br. at 19. Accord Johnson Br. at 19-20. Rather, as described above, what matters is the real world impact that success on the prisoner's claim would have on a protected state decision. If a win would imply the invalidity of a protected decision, the claim is barred, regardless of the details of the prisoner's complaint or the specifics of the relief requested. Consequently, it does not matter that that Respondents' complaints expressly targeted only the earlier decisions. Rather, the only question is whether success on their claims would invalidate a sentencing decision.

Here, success on Respondents' claims would have that effect, both on the earlier decisions and on the more recent ones. Respondents claim that any application of the parole

guidelines—guidelines adopted after they committed their crimes—to their parole hearings violates the Ex Post Facto Clause, making the resulting decisions so flawed as to require new hearings. Petitioners' Br. at 12-14; Dotson Br. at 5-6; Johnson Br. at 8. Those claims, if accepted, would be fatal to both the earlier and later decisions, as both sets were based on the same guidelines. Dotson Br. App. at 1a, line 3 and 3a, line 8(A); Johnson Br. App. at 1a, line 3 and 3a, line 8(A). Since, as discussed above, those decisions are sentencing decisions, Respondents' claims are *Heck*-barred because success on those claims would necessarily imply the invalidity of all these sentencing decisions.

2. Indeed, far from helping him here, the new parole decision in Dotson's case actually undercuts one of his primary arguments. Dotson asserts that the decision in his 2000 halfway review does not count for *Heck* purposes because it was not an actual parole decision, but was merely a scheduling decision determining when he would receive an actual parole hearing. Dotson Br. at 28-31. Whatever merits that argument may have had (and Petitioners do not concede it had any), it is now irrelevant as Dotson has received what even he recognizes as an actual parole release decision, one that was based on the guidelines he claims cannot be constitutionally applied to him. Hence the contingencies that Dotson argues insulate his claims from scrutiny under *Heck* have been removed.

3. Nor do the new hearings somehow undercut the *Heck* bar, as Respondents suggest, by making aspects of Respondents' claims "moot." See Dotson Br. at 28; Johnson Br. at 24. First, it is important to note that Respondents are not using the term "moot" in its traditional jurisdictional sense. Indeed, Johnson goes on at length as to why the case itself is not moot. See Johnson Br. at 24 n.18. That is not surprising as, if it is moot now, it was also moot at the time of the appeals court decision (circuit court arguments were

held, and the decision was issued, after the 2002 parole hearings occurred), requiring the decision below to be vacated as well. See *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 72-73 (1983).

Rather, Respondents are using the term in an attempt to peel away the aspects of their claims that they recognize most directly implicate *Heck*. Essentially, they are arguing that, because the old hearings have been "replaced" by new ones and thus are "moot," their claims, even if successful, will not invalidate anything. But that argument again simply ignores the impact that success on their claims would have on the new 2002 decisions. As noted above, the claims they advance, if successful, would invalidate the 2002 decisions, just like the earlier ones. That invalidation alone triggers *Heck*.

Moreover, even if the Court looks past the impact on the 2002 decisions, Respondents' "mootness" argument still fails to save their claims from *Heck's* bar. Respondents are essentially arguing that the earlier decisions have been "terminated" and thus cannot be "invalidated." If they are relying on "termination," however, they must show "favorable termination." See *Heck*, 512 U.S. at 486-487 (describing what counts as "favorable termination"). But Respondents have not done so here, as they have not shown that the new hearings resulted from any state determination that the prior hearings were defective (indeed they admit that the State applied the same guidelines at those later hearings). Thus, *Heck* still bars their claims.

D. Respondents' claims are cognizable in habeas and are therefore *Heck*-barred.

Petitioners' opening brief explained that *Heck* expanded on the rule, announced in *Preiser*, that claims covered by the habeas statutes should be routed through

those specific statutes rather than the more general provisions of § 1983. It also explained why Respondents' challenges to their parole decisions are well within the scope of the habeas statutes, and so are barred by *Heck's* broader rule. Petitioners' Br. at 31-39.

Respondents have not disputed *Heck's* gate-keeping function, or that it goes further than *Preiser*. Instead, they first seek to avoid the obvious relevance of their claims' cognizability in habeas by arguing that the question is not properly before the Court. As a fallback, they contend that their claims are not cognizable in habeas because they will not guarantee release. Both arguments are wrong.

1. Petitioners are not, as Dotson suggests, seeking reversal based on *Preiser* rather than *Heck*. See Dotson Br. at 39-41. Rather, as Petitioners explained in their opening brief, *Heck* reprises and extends *Preiser*, a fact Respondents do not dispute. Petitioners' Br. at 33-34; Dotson Br. at 18, 19; Johnson Br. at 19-20. It was therefore perfectly appropriate to discuss the relationship between those cases, as Respondents themselves do. Based on that relationship, however, it is clear that *Heck*, like *Preiser*, directs that claims that sound in habeas must be brought in habeas.

That aspect of *Heck* prevents Respondents from pursuing their § 1983 claims here for two reasons. First, Respondents request an immediate new parole release hearing. Whether or not they would be successful in actually obtaining release at that hearing is an open question. But, no one can dispute that they seek the hearing in hopes of attaining such release. Such claims are ultimately about release from confinement and thus sound, if at all, in habeas. Similarly, if Respondents are successful in their claims, the State would be required to use older parole guidelines under which Respondents would be entitled to parole determinations more frequently. This would again raise the

prospect of earlier release—deferring additional parole consideration for five years, rather than one year, would increase the average time of incarceration—even if the federal court order would not require such release per se.

2. Respondents' assertion that their claims are not cognizable in habeas because success on the claims would not guarantee release is contrary to both the plain language of the habeas statutes and this Court's precedents.

28 U.S.C. §§ 2241(c)(3) and 2254(a) authorize habeas relief when prisoners claim to be "in custody in violation of the Constitution" and that is exactly what these prisoners claim. Both are "in custody" for fixed periods of time because of disputed parole decisions. J.A. at 16, 17, 56; Dotson Br. at 4, 27-28; Dotson Br. App. 3a at line 8, 4a at line 9; Johnson Br. App. at 3a at line 8, 4a at line 9. Both want the decisions vacated because the quantum of punishment those decisions impose, i.e., the period they will need to serve before their next release hearing, is based on parole guidelines allegedly applied "in violation of the [Ex Post Facto Clause] of the Constitution." Respondents therefore claim both that they are "in custody," and that this custody is "in violation of the Constitution," bringing their claims squarely within the habeas statutes.

That success would not guarantee Respondents earlier release does not change that. Nothing in the language of §§ 2241(c)(3) or 2254(a) makes guaranteed release a precondition to seeking habeas. To the contrary, Congress deleted such a requirement, see Petitioners' Br. at 37-38, and this Court's precedents show that a prisoner's claim need not result in guaranteed release to be cognizable in habeas. The claims in *Garlotte v. Fordice*, 515 U.S. 39 (1995), and *Maleng v. Cook*, 490 U.S. 488 (1989), did not guarantee those petitioners immediate or expedited release, but merely sought to advance "the prisoner's date of potential release."

Garlotte, 515 U.S. at 43. The claim in *In re Bonner*, 151 U.S. 242 (1894), did not change that petitioner's release date, but only resulted in his serving his full sentence in a different prison. And the prisoner bringing *Braden v. 30th District Circuit Court*, 410 U.S. 484 (1973), did not seek release, but only a trial at which there was no guarantee of release. Yet this Court upheld the availability of habeas relief in each of those cases. Simply put, habeas has no "guaranteed impact on release" requirement.

Nor do the cases Respondents cite demonstrate otherwise. Although *Preiser* did state that claims having that effect are cognizable in habeas, it did not hold that only such claims are cognizable. While *Fay v. Noia*, 372 U.S. 391 (1963); *In re Medley*, 134 U.S. 160 (1890); *INS v. St. Cyr*, 533 U.S. 289 (2001); *Johnson v. Avery*, 393 U.S. 483 (1969); *Allen v. McCurry*, 449 U.S. 90 (1980); *Townsend v. Swain*, 372 U.S. 293 (1963), and *Peyton v. Rowe*, 391 U.S. 54 (1968), observed that habeas is generally concerned with illegal detention, none hold that a claim *must* compel release to fall within the habeas statutes. To the contrary, *Johnson v. Avery* sustained a habeas claim that did not challenge the petitioner's confinement, but only certain regulations preventing him from helping other prisoners prepare legal papers. 393 U.S. at 484. Thus, none of those authorities compel adoption of Respondents' suggestion that habeas extends only to those claims that will "ensure [a prisoner's] expedited release." Dotson Br. at 43.

The *Heck* doctrine is intended not only to protect state decisions, but also to route claims covered by the more specific habeas statutes through those procedures rather than the generalized provisions of § 1983. The Respondents' constitutional challenges to the decisions controlling their custody fit within the language of the habeas statutes, and

they have pointed to nothing justifying a departure from that language. That strongly supports the conclusion that their claims are *Heck*-barred.

E. Respondents' arguments notwithstanding, comity and federalism concerns do support routing the claims here through habeas.

Petitioners' opening brief explained that comity concerns, and in particular the need to avoid premature federal intervention in core state functions, supported their reading of *Heck*, as does the fact that Petitioners' approach would give State courts the chance to resolve many difficult parole release claims on state law grounds. Respondents make two arguments in response, but each fails.

1. Respondents' contention that comity cannot overcome the text of § 1983 is simply wrong. See Johnson Br. at 40. This Court has repeatedly held that claims within the textual scope of that statute can indeed be routed to the state courts for comity reasons. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116-117 (1981); *Trainor v. Hernandez*, 431 U.S. 434, 446-448 (1977); *Juidice v. Vail*, 430 U.S. 327, 338-339 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 612-613 (1975); *Younger v. Harris*, 401 U.S. 37, 54 (1971); *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951). Each of those cases was brought under § 1983, and in each, as in *Preiser*, the Court held that the claims should be pressed in state court proceedings even though they fell within the literal scope of § 1983. Respondents are therefore wrong to suggest that comity concerns must inevitably yield to the text of § 1983.

2. Respondents are also wrong to suggest that deferring § 1983 review in order to allows resolution of claims on state law grounds is impermissible. Dotson Br. at 50. This Court has repeatedly held that cases brought under

§ 1983 are better left to state courts for consideration under state law if that is likely to resolve the underlying dispute. *Bellotti v. Baird*, 428 U.S. 132, 146-147 (1976); *Pennzoil Co. v. Texaco*, 481 U.S. 1, 10-12 (1987).

Submissions in this Court show the unique utility of doing so in the parole context. Ohio's courts have not hesitated to vindicate prisoners' state law rights in the parole process, see e.g. *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St. 3d 456 (2002), and that trend has continued with the recent decision in *Ankrom v. Hageman*, Case No. 01CVH02-1563 (Franklin Co. C. P., Aug. 31, 2004) (attached to the "Amicus Brief on behalf of 2,974 Current and Former Inmates"). Together, those cases have resolved thousands of potential § 1983 claims on state law grounds. The fact that such resolutions are available through the state courts strongly supports Petitioners' reading of *Heck*, a reading that would steer such claims to the state courts.

CONCLUSION

For the above reasons, as well as those stated in Petitioners' opening brief, the judgments below should be reversed.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE*
**Counsel of Record*
State Solicitor
STEPHEN P. CARNEY
Senior Deputy Solicitor
TODD R. MARTI
Assistant Solicitor
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioners

November 19, 2004